

AMENDED IN SENATE AUGUST 5, 2002

AMENDED IN SENATE JUNE 19, 2002

AMENDED IN ASSEMBLY MAY 23, 2002

AMENDED IN ASSEMBLY APRIL 17, 2002

CALIFORNIA LEGISLATURE—2001–02 REGULAR SESSION

ASSEMBLY BILL

No. 1938

Introduced by Assembly Member Aroner

February 14, 2002

An act to amend Sections 391 and 391.7 of the Code of Civil Procedure, to amend Sections 210, 3041, and 8804 of the Family Code, and to amend Sections 1000, ~~1470, 1513~~, and 1601 of, and to add Chapter 3 (commencing with Section 1610) to Part 2 of Division 4 of, the Probate Code, relating to guardianship, conservatorship, and custody.

LEGISLATIVE COUNSEL'S DIGEST

AB 1938, as amended, Aroner. Guardianship: conservatorships: custody.

(1) Existing law authorizes a defendant in any litigation pending in any court of this state, at any time until final judgment is entered, to move for a court order requiring the plaintiff to furnish security as a vexatious litigant, as defined. Existing law requires the litigation to be dismissed as to the defendant for whose benefit the security was ordered, if it is not furnished.

This bill would clarify that these provisions apply to proceedings under the Family Code or Probate Code, and specifically extend these

provisions to any petition, application, or motion other than a discovery motion, in a proceeding under the Family Code or Probate Code, for any order.

(2) Under existing law, before making an order granting custody to a person or persons other than a parent, without the consent of the parents, a court is required to make a finding that granting custody to a parent would be detrimental to the child and that granting custody to a nonparent is required to serve the best interest of the child.

This bill would, instead, require that the finding be made before making that order over the objection of, rather than without the consent of, a parent. The bill would define detriment to a child, and require a finding that parental custody is detrimental to the child to be supported by clear and convincing evidence unless the court finds by a preponderance of the evidence that custody would be granted to a person who has assumed the role of a parent for a substantial period, and would make related changes. This finding would constitute a finding that the custody is in the best interest of the child and that parental custody would be detrimental to the child, absent a showing by a preponderance of evidence to the contrary, as specified. A finding of detriment to the child would not require any finding of unfitness of the parents for these purposes.

~~(3) Under existing law, unless waived by the court, a court investigator, probation officer, or domestic relations investigator may make an investigation and file with the court a report and recommendation concerning each proposed guardianship of the person or guardianship of the estate. Existing law also requires the county clerk to make provisions for the limitation of the report exclusively to persons entitled to its receipt.~~

~~This bill would make this investigation, and report and recommendation, mandatory. The bill would also require the clerk of the court, rather than the county clerk, to make provisions for the limitation of the report exclusively to persons entitled to its receipt.~~

~~(4) Under existing law, upon the petition of the guardian, a parent, or the ward, a court may make an order terminating the guardianship if the court determines that it is no longer necessary that the ward have a guardian or that it is in the ward's best interest to terminate the guardianship.~~

This bill would delete the determination that the guardianship is no longer necessary as grounds for an order terminating guardianship. The bill would make various legislative findings.



~~(5) The bill would impose a state-mandated local program by requiring new duties of local officers.~~

~~(6) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed \$1,000,000 statewide and other procedures for claims whose statewide costs exceed \$1,000,000.~~

~~This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.~~

Vote: majority. Appropriation: no. Fiscal committee: ~~yes~~ *no*. State-mandated local program: ~~yes~~ *no*.

The people of the State of California do enact as follows:

1 SECTION 1. Section 391 of the Code of Civil Procedure is
2 amended to read:

3 391. As used in this title, the following terms have the
4 following meanings:

5 (a) "Litigation" means any civil action or proceeding,
6 including, but not limited to, a proceeding under the Family Code
7 or Probate Code, commenced, maintained or pending in any state
8 or federal court.

9 (b) "Vexatious litigant" means a person who does any of the
10 following:

11 (1) In the immediately preceding seven-year period has
12 commenced, prosecuted, or maintained in propria persona at least
13 five litigations other than in a small claims court that have been (i)
14 finally determined adversely to the person or (ii) unjustifiably
15 permitted to remain pending at least two years without having been
16 brought to trial or hearing.

17 (2) After a litigation has been finally determined against the
18 person, repeatedly relitigates or attempts to relitigate, in propria
19 persona, either (i) the validity of the determination against the
20 same defendant or defendants as to whom the litigation was finally
21 determined or (ii) the cause of action, claim, controversy, or any
22 of the issues of fact or law, determined or concluded by the final



1 determination against the same defendant or defendants as to
2 whom the litigation was finally determined.

3 (3) In any litigation while acting in propria persona, repeatedly
4 files unmeritorious motions, pleadings, or other papers, conducts
5 unnecessary discovery, or engages in other tactics that are
6 frivolous or solely intended to cause unnecessary delay.

7 (4) Has previously been declared to be a vexatious litigant by
8 any state or federal court of record in any action or proceeding
9 based upon the same or substantially similar facts, transaction, or
10 occurrence.

11 (c) “Security” means an undertaking to assure payment, to the
12 party for whose benefit the undertaking is required to be furnished,
13 of the party’s reasonable expenses, including attorney’s fees and
14 not limited to taxable costs, incurred in or in connection with a
15 litigation instituted, caused to be instituted, or maintained or
16 caused to be maintained by a vexatious litigant.

17 (d) “Plaintiff” means the person who commences, institutes or
18 maintains a litigation or causes it to be commenced, instituted or
19 maintained, including an attorney at law acting in propria persona.

20 (e) “Defendant” means a person (including corporation,
21 association, partnership and firm or governmental entity) against
22 whom a litigation is brought or maintained or sought to be brought
23 or maintained.

24 SEC. 2. Section 391.7 of the Code of Civil Procedure is
25 amended to read:

26 391.7. (a) In addition to any other relief provided in this title,
27 the court may, on its own motion or the motion of any party, enter
28 a prefiling order which prohibits a vexatious litigant from filing
29 any new litigation in the courts of this state in propria persona
30 without first obtaining leave of the presiding judge of the court
31 where the litigation is proposed to be filed. Disobedience of the
32 order by a vexatious litigant may be punished as a contempt of
33 court.

34 (b) The presiding judge shall permit the filing of that litigation
35 only if it appears that the litigation has merit and has not been filed
36 for the purposes of harassment or delay. The presiding judge may
37 condition the filing of the litigation upon the furnishing of security
38 for the benefit of the defendants as provided in Section 391.3.

39 (c) The clerk may not file any litigation presented by a
40 vexatious litigant subject to a prefiling order unless the vexatious



1 litigant first obtains an order from the presiding judge permitting
2 the filing. If the clerk mistakenly files the litigation without the
3 order, any party may file with the clerk and serve on the plaintiff
4 and other parties a notice stating that the plaintiff is a vexatious
5 litigant subject to a prefiling order as set forth in subdivision (a).
6 The filing of the notice shall automatically stay the litigation. The
7 litigation shall be automatically dismissed unless the plaintiff
8 within 10 days of the filing of that notice obtains an order from the
9 presiding judge permitting the filing of the litigation as set forth
10 in subdivision (b). If the presiding judge issues an order permitting
11 the filing, the stay of the litigation shall remain in effect, and the
12 defendants need not plead, until 10 days after the defendants are
13 served with a copy of the order.

14 (d) For purposes of this section, “litigation” includes any
15 petition, application, or motion other than a discovery motion, in
16 a proceeding under the Family Code or Probate Code, for any
17 order.

18 (e) The clerk of the court shall provide the Judicial Council a
19 copy of any prefiling orders issued pursuant to subdivision (a). The
20 Judicial Council shall maintain a record of vexatious litigants
21 subject to those prefiling orders and shall annually disseminate a
22 list of those persons to the clerks of the courts of this state.

23 SEC. 3. Section 210 of the Family Code is amended to read:

24 210. Except to the extent that any other statute or rules
25 adopted by the Judicial Council provide applicable rules, the rules
26 of practice and procedure applicable to civil actions generally,
27 including the provisions of Title 3a (commencing with Section
28 391) of Part 2 of the Code of Civil Procedure, apply to, and
29 constitute the rules of practice and procedure in, proceedings
30 under this code.

31 SEC. 4. Section 3041 of the Family Code is amended to read:

32 3041. (a) Before making an order granting custody to a
33 person or persons other than a parent, over the objection of a
34 parent, the court shall make a finding that granting custody to a
35 parent would be detrimental to the child and that granting custody
36 to the nonparent is required to serve the best interest of the child.
37 Allegations that parental custody would be detrimental to the
38 child, other than a statement of that ultimate fact, shall not appear
39 in the pleadings. The court may, in its discretion, exclude the
40 public from the hearing on this issue.



1 (b) Subject to subdivision (d), a finding that parental custody
2 would be detrimental to the child shall be supported by clear and
3 convincing evidence.

4 (c) As used in this section, “detriment to the child” includes the
5 harm of removal from a stable placement of a child with a person
6 who has assumed, on a day-to-day basis, the role of his or her
7 parent, fulfilling both the child’s physical needs and the child’s
8 psychological needs for care and affection, and who has assumed
9 that role for a substantial period of time. A finding of detriment
10 does not require any finding of unfitness of the parents.

11 (d) Notwithstanding subdivision (b), if the court finds by a
12 preponderance of the evidence that the person to whom custody
13 may be given is a person described in subdivision (c), this finding
14 shall constitute a finding that the custody is in the best interest of
15 the child and that parental custody would be detrimental to the
16 child absent a showing by a preponderance of the evidence to the
17 contrary.

18 SEC. 5. Section 8804 of the Family Code is amended to read:

19 8804. (a) Whenever the petitioners move to withdraw the
20 petition for the adoption or to dismiss the proceeding, the clerk of
21 the court in which the proceeding is pending shall immediately
22 notify the department at Sacramento of the action. The department
23 or the delegated county adoption agency shall file a full report with
24 the court recommending a suitable plan for the child in every case
25 where the petitioners move to withdraw the petition for the
26 adoption or where the department or delegated county adoption
27 agency recommends that the petition for adoption be denied and
28 shall appear before the court for the purpose of representing the
29 child.

30 (b) Notwithstanding the withdrawal or dismissal of the
31 petition, the court may retain jurisdiction over the child for the
32 purposes of making any order for the child’s custody that the court
33 deems to be in the child’s best interest.

34 (c) If a birth parent who did not place a child for adoption as
35 specified in Section 8801.3 has refused to give the required
36 consent, or a birth parent revokes consent as specified in Section
37 8814.5, the court shall order the child restored to the care and
38 custody of the birth parent or parents subject to the provisions of
39 Section 3041.

40 SEC. 6. Section 1000 of the Probate Code is amended to read:



1 1000. Except to the extent that this code provides applicable
2 rules, the rules of practice applicable to civil actions, including
3 discovery proceedings and proceedings under Title 3a
4 (commencing with Section 391) Part 2 of the Code of Civil
5 Procedure, apply to, and constitute the rules of practice in,
6 proceedings under this code. All issues of fact joined in probate
7 proceedings shall be tried in conformity with the rules of practice
8 in civil actions.

9 ~~SEC. 7.—Section 1513 of the Probate Code is amended to read:~~

10 ~~1513.—(a) Unless waived by the court, a court investigator,~~
11 ~~probation officer, or domestic relations investigator shall make an~~
12 ~~investigation and file with the court a report and recommendation~~
13 ~~concerning each proposed guardianship of the person or~~
14 ~~guardianship of the estate. Investigations where the proposed~~
15 ~~guardian is a relative shall be made by a court investigator.~~
16 ~~Investigations where the proposed guardian is a nonrelative shall~~
17 ~~be made by the county agency designated to investigate potential~~
18 ~~dependency. The report for the guardianship of the person shall~~
19 ~~include, but need not be limited to, an investigation and discussion~~
20 ~~of all of the following:~~

- 21 ~~(1) A social history of the guardian.~~
- 22 ~~(2) A social history of the proposed ward, including, to the~~
23 ~~extent feasible, an assessment of any identified developmental,~~
24 ~~emotional, psychological, or educational needs of the proposed~~
25 ~~ward and the capability of the petitioner to meet those needs.~~
- 26 ~~(3) The relationship of the proposed ward to the guardian,~~
27 ~~including the duration and character of the relationship, where~~
28 ~~applicable, the circumstances whereby physical custody of the~~
29 ~~proposed ward was acquired by the guardian, and a statement of~~
30 ~~the proposed ward's attitude concerning the proposed~~
31 ~~guardianship, unless the statement of the attitude is affected by the~~
32 ~~proposed ward's developmental, physical, or emotional condition.~~
- 33 ~~(4) The anticipated duration of the guardianship and the plans~~
34 ~~of both natural parents and the proposed guardian for the stable and~~
35 ~~permanent home for the child. The court may waive this~~
36 ~~requirement for cases involving relative guardians.~~
- 37 ~~(b) The report shall be read and considered by the court prior~~
38 ~~to ruling on the petition for guardianship, and shall be reflected in~~
39 ~~the minutes of the court. The person preparing the report may be~~
40 ~~called and examined by any party to the proceeding.~~



1 ~~(c) If the investigation finds that any party to the proposed~~
2 ~~guardianship alleges the minor's parent is unfit, as defined by~~
3 ~~Section 300 of the Welfare and Institutions Code, the case shall be~~
4 ~~referred to the county agency designated to investigate potential~~
5 ~~dependencies. Guardianship proceedings shall not be completed~~
6 ~~until the investigation required by Sections 328 and 329 of the~~
7 ~~Welfare and Institutions Code is completed and a report is~~
8 ~~provided to the court in which the guardianship proceeding is~~
9 ~~pending.~~

10 ~~(d) The report authorized by this section is confidential and~~
11 ~~shall only be made available to persons who have been served in~~
12 ~~the proceedings or their attorneys. The clerk of the court shall~~
13 ~~make provisions for the limitation of the report exclusively to~~
14 ~~persons entitled to its receipt.~~

15 ~~(e) For the purpose of writing the report authorized by this~~
16 ~~section, the person making the investigation and report shall have~~
17 ~~access to the proposed ward's school records, probation records,~~
18 ~~and public and private social services records, and to an oral or~~
19 ~~written summary of the proposed ward's medical records and~~
20 ~~psychological records prepared by any physician, psychologist, or~~
21 ~~psychiatrist who made or who is maintaining those records. The~~
22 ~~physician, psychologist, or psychiatrist shall be available to clarify~~
23 ~~information regarding these records pursuant to the investigator's~~
24 ~~responsibility to gather and provide information for the court.~~

25 ~~(f) This section does not apply to guardianships resulting from~~
26 ~~a permanency plan for a dependent child pursuant to Section~~
27 ~~366.25 of the Welfare and Institutions Code.~~

28 ~~(g) For purposes of this section, a "relative" means a person~~
29 ~~who is a spouse, parent, stepparent, brother, sister, stepbrother,~~
30 ~~stepsister, half brother, half sister, uncle, aunt, niece, nephew, first~~
31 ~~cousin, or any person denoted by the prefix "grand" or "great,"~~
32 ~~or the spouse of any of these persons, even after the marriage has~~
33 ~~been terminated by death or dissolution.~~

34 ~~SEC. 8.~~

35 *SEC. 7.* Section 1601 of the Probate Code is amended to read:
36 1601. Upon petition of the guardian, a parent, or the ward, the
37 court may make an order terminating the guardianship if the court
38 determines that it is in the ward's best interest to terminate the
39 guardianship. Notice of the hearing on the petition shall be given



1 for the period and in the manner provided in Chapter 3
2 (commencing with Section 1460) of Part 1.

3 ~~SEC. 9.~~

4 SEC. 8. Chapter 3 (commencing with Section 1610) is added
5 to Part 2 of Division 4 of the Probate Code, to read:

6

7 CHAPTER 3. PERMANENT AND STABLE HOME

8

9 1610. (a) The Legislature finds and declares that it in the best
10 interest of children to be raised in a permanent, safe, stable, and
11 loving environment.

12 (b) Unwarranted petitions, applications, or motions other than
13 discovery motions after the guardianship has been established
14 create an environment that can be harmful to children and are
15 inconsistent with the goals of permanency, safety, and stability.

16 ~~SEC. 10. Notwithstanding Section 17610 of the Government~~
17 ~~Code, if the Commission on State Mandates determines that this~~
18 ~~act contains costs mandated by the state, reimbursement to local~~
19 ~~agencies and school districts for those costs shall be made pursuant~~
20 ~~to Part 7 (commencing with Section 17500) of Division 4 of Title~~
21 ~~2 of the Government Code. If the statewide cost of the claim for~~
22 ~~reimbursement does not exceed one million dollars (\$1,000,000),~~
23 ~~reimbursement shall be made from the State Mandates Claims~~
24 ~~Fund.~~

